COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Covad Communications Company	:	
	:	
v.	:	D.T.E. ______
	:	
Verizon Massachusetts	:	
Tariff M.D.T.E. No. 17	:	

COMPLAINT OF COVAD COMMUNICATIONS COMPANY TO SUSPEND, INVESTIGATE AND MODIFY CERTAIN PROVISIONS OF THE OCTOBER 2, 2003 PROPOSED REVISIONS TO VERIZON MASSACHUSETTS TARIFF M.D.T.E. NO. 17

Covad Communications Company ("Covad") respectfully submits these comments in accordance with the Massachusetts Department of Telecommunications and Energy's ("Department") October 8, 2003 Procedural Memorandum, which requested that parties provide comments regarding Verizon Massachusetts' ("Verizon") revisions to its Tariff M.D.T.E. No. 17 ("Tariff 17") ("October 2 Tariff Filing") purporting to comply with the Federal Communications Commission's ("FCC") *Triennial Review Order*.[1] Covad hereby submits its Complaint in response to the October 2 Tariff Filing.

The Department should suspend and investigate the proposed tariff revisions of Verizon because they do not correctly implement the *Triennial Review Order*. First, Verizon incorrectly interprets the FCC's grandfathering rule for existing line sharing arrangements and unilaterally imposes additional limitations on CLECs. Second, Verizon's standard Interconnection Agreement that it offers to all CLECs in

[1] *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147 (FCC 03-06), rel. August 21, 2003.

Massachusetts only provides line sharing to CLECs in accordance with, and subject to, the rates, terms and conditions set forth in Verizon's Tariff 17. Therefore, it is essential that the Department require Verizon to tariff, in detail, all of its line sharing obligations in Massachusetts. Accordingly, Verizon must *accurately* tariff, in detail, (1) its obligations under the *Triennial Review Order's* Section 251 transitional plan; ***and*** (2) unbundled access to line sharing under Section 271 of the Telecommunications Act of 1996 ("Act"). This Department retains the requisite authority under Massachusetts law to require Verizon to tariff line sharing on an unbundled basis. Such independent state law authority is preserved by the Act and is not preempted by the FCC's recent *Triennial Review Order.* This Department should also require Verizon to tariff unbundled access to line sharing pursuant to Massachusetts state law.

Finally, this Department must clarify that Verizon may not impose its misguided interpretation of the *Triennial Review Order* until the Department has reviewed, modified and made effective Verizon's tariff modifications to Tariff 17. The FCC itself in its pleadings before the Court of Appeals for the District of Columbia stated that line sharing remains available to CLECs under existing terms and conditions, which are not affected in the short term by its new rules, until such new rules are incorporated into the interconnection agreement terms and conditions (i.e., the effective date of modifications to Tariff 17).[2] Although the FCC's language refers to the contractual change of law provisions that provide a mechanism for incorporation of the new line sharing rules, this interpretation applies equally to new line sharing rules incorporated into interconnection

[2] Opposition of the Federal Communications Commission to Covad's Motion for Stay Pending Review at fn 3, *United States Telecom Ass'n v. FCC and United States of America,* No. 03-1310 (D.C. Cir. Filed Oct. 9, 2003).

agreements via tariff changes. In other words, Verizon should not be allowed to impose its unreasonable position regarding the *Triennial Review Order* until the Department has ruled on Verizon's modifications to this tariff. Covad is concerned that Verizon will attempt to unilaterally self-execute its view of the *Triennial Review Order* prior to consideration by this Department.

I. Grandfathering Line Sharing Arrangements

The FCC's line sharing rules grandfathered "all existing line sharing arrangements unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user customer."[3] Verizon takes the FCC's language and unilaterally imposes additional limitations on CLECs. Specifically, Verizon's proposed tariff language states that an existing line sharing arrangement will be grandfathered:

> provided the TC began providing xDSL service to its end user customer using Line Sharing over that Loop or Subloop prior to October 2, 2003, and only so long as the TC has not ceased providing xDSL service to that end user customer over that Loop or Subloop at that location.

Verizon's interpretation is wrong for numerous reasons.

The FCC never meant that a CLEC must have begun providing xDSL service to an end user before a line sharing arrangement became eligible for grandfathering. Rather, the only reasonable point in time to determine if a line sharing arrangement is eligible for grandfathering begins from the moment a CLEC submits an order to Verizon to provision service to an end user, not once the line sharing loop has been provisioned and the customer is actually receiving DSL service. Among other things, Verizon should be prohibited from using its own poor performance and ordering, processing, provisioning

[3] *See Triennial Review Order*, ¶ 264.

and repair delays in order to frustrate the grandfathering of eligible line sharing arrangements.

Next, the *Triennial Review Order* makes clear that a line sharing arrangement is grandfathered until a particular end user customer cancels or otherwise discontinues the service of the CLEC. Verizon's bold misinterpretation ties grandfathering not only to a particular end user customer, but also to the exact copper loop or subloop serving the end user and the exact customer location. Meaning, if a copper loop serving an existing line sharing arrangement is not properly maintained by Verizon, is retired, gets cut, or for some reason no longer works, rather than repairing the loop or moving the end user to a working loop through a line and station transfer as it routinely does for its own retail customers, Verizon's proposed tariff would, arguably, allow Verizon to end grandfathering of that arrangement to that end user even if the end user wishes to continue receiving the CLEC's DSL service. Similarly, if an end user moves locations and wishes to continue receiving a CLEC's DSL service, Verizon's proposed tariff would, arguably, allow it to end grandfathering of that arrangement, rather than transferring the grandfathered line sharing arrangement to the end user's new home as it routinely does for its own retail customers.

II. New Line Sharing Arrangements.

Currently, Verizon's standard Interconnection Agreement that it offers to all CLECs in Massachusetts provides line sharing in accordance with, and subject to, the rates, terms and conditions set forth in Verizon's D.T.E. MA No. 17 Tariff. Therefore, it is essential that the Department require Verizon to tariff, in detail, all of its line sharing obligations in Massachusetts. For this reason, Verizon cannot simply stop offering line sharing pursuant to its tariff. Verizon's proposal to provision new line sharing arrangements on a transitional basis pursuant to terms offered in a separate agreement subject to its view of FCC-prescribed pricing rules is completely unacceptable. Arguably, CLECs may be forced to take Verizon's unreasonable position regarding basic line sharing terms and conditions and pricing that expose CLECs to numerous business risks. If, pursuant to Section 252, a CLEC chooses to negotiate, and eventually arbitrate, rates, terms and conditions for line sharing, the only backdrop for CLECs may be Verizon's one sided terms. Verizon's position will virtually always be contrary to the CLEC's interests. Given this, Verizon must be forced to tariff, in detail, (1) its obligations under the *Triennial Review Order's* Section 251 transitional plan; ***and*** (2) unbundled access to line sharing under Section 271 of the Act.

A. The Department Has Authority Pursuant to Section 271 of the Act to Require Verizon to Provide Unbundled Access to Line Sharing.

As discussed above, Verizon must tariff line sharing pursuant to its unbundling obligations under Section 271 of the Act. This Department has the authority to enforce the unbundling requirements of Section 271 of the federal Telecommunications Act. The FCC made clear in the *Triennial Review* that section 271 creates independent access obligations for the Regional Bell Operating Companies:

> [W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.[4]
>
> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved

[4] *See Triennial Review Order*, ¶ 653.

> based on any determination we make under the section 251 unbundling analysis.[5]

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, as a Bell Operating Company, Verizon retains an independent statutory obligation under section 271 of the Act to provide competitors with unbundled access to the network elements listed in the section 271 checklist.[6] There is no question that Verizon's network access obligations include the provision of unbundled access to loops under checklist item #4: "Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251."[7]

In addition, the Department has independent authority to enforce these section 271 BOC obligations. Specifically, the Massachusetts General Laws grant to this Department broad authority to investigate service offerings in the context of proposed tariffs.[8] The Department also has independent state law authority under its ability to hold public hearings upon notice of a proposed rate change.[9] This investigative authority encompasses the authority to ensure that Verizon fulfills its statutory duties under section 271. Furthermore, not even Verizon would dare to argue that the Department's enforcement of Verizon's section 271 checklist obligations would "substantially prevent the implementation" of any provision of the federal Telecommunications Act. In fact,

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5 *See Triennial Review Order*, ¶ 655.

6 *See* 47 U.S.C. § 271(c)(2)(B).

7 *See Triennial Review Order*, ¶ 654.

8 MASS GEN. LAWS ANN. ch 159 §19.

9 *Id*. at §20.

where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized.[10] Indeed, the Act expressly preserves a state role in the review of a BOC's compliance with its section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a BOC's section 271 compliance.[11] Thus, the Department clearly has the authority to enforce Verizon's obligations to provide unbundled access to loops under Section 271 checklist item #4.

Although the FCC concluded in its *Triennial Review Order* that competitors are not impaired without unbundled access to line sharing pursuant to section 251(c)(3) of the Act, the FCC acknowledged that section 271 creates separate, statutory line sharing unbundling obligations for the Bells, wholly separate and apart from the statutory unbundling obligations in section 251. Verizon cannot deny that section 271 checklist item 4 requires the Bells to provide access to the high frequency portion of the loop ("HFPL"). By its plain language, checklist item 4 requires the Bells to provide access to "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[12] The HFPL is clearly a form of loop transmission—a loop transmission that Verizon itself routinely uses to provide xDSL services separately from narrowband voice services.[13] In light of this clear statutory

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[10] *See Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *See De Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers*, 373 U.S. at 142, 83 S.Ct. at 1217).

[11] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing BOC compliance with the 271 checklist).

[12] *See* 47 U.S.C. § 271(c)(2)(B)(iv).

[13] In other words, Verizon customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

language, there is no question that Verizon remains under a statutory obligation to offer unbundled HFPL loop transmission to competitors, notwithstanding the FCC's finding of no impairment pursuant to section 251.

Each time the FCC has reviewed a 271 application since the advent of line sharing the FCC has insisted the BOC long distance applicant offer non-discriminatory access to the HFPL in order to comply with checklist item #4.[14] To this day, after its decision to eliminate HFPL access in the *Triennial Review Order*, the FCC continues to look at the non-discriminatory availability of line sharing as an integral component of its checklist item #4 analysis in section 271 proceedings.[15] The significance of this point cannot be overstated. The FCC required SBC, the BOC long distance applicant, to provide non-discriminatory access to the HFPL as a precondition to gaining long distance authority pursuant to checklist item #4 of section 271 <u>after</u> the *Triennial Review Order* eliminated line sharing (the HFPL) as a UNE.[16] There is simply no question that the Act, and the FCC, require Verizon to provide non-discriminatory access to the HFPL if Verizon desires to provide long distance services.

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[14] *See, e.g., Joint Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Kansas and Oklahoma,* Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶. 214-219 (2001).

[15] See Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin, Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, paras. 142-145. See Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota, Memorandum Opinion and Order, WC Docket No. 03-90, FCC 03-142, para. 53, and App. C, ¶¶ 50-51; See Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order, WC Docket No. 03-138, FCC 03-228, paras. 133-143.

[16] *See id*. at ¶ 1.

B. The Department Has Authority Pursuant to Section 271 of the Act to Require Verizon to Price Line Sharing at TELRIC

The FCC did make clear in the *Triennial Review Order* that a different pricing standard applied to network elements required to be unbundled under section 271 as opposed to network elements unbundled under section 251 of the Communications Act. Specifically, the FCC stated that "the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[17] In other words, according to the FCC, the appropriate *legal standard* under which the pricing for section 271 checklist items should be determined is a different *legal standard* than the one under which the pricing of section 251 UNEs is required to be determined. Thus, "section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not *require* TELRIC pricing."[18]

Notably, in the *Triennial Review Order*, the FCC nowhere forbids the application of a forward-looking, long-run incremental cost standard to the pricing of network elements required to be unbundled under section 271. Rather, the FCC merely states that unbundled access to section 271 checklist items is not *required* to be priced pursuant to the particular forward-looking cost methodology specified in the FCC's rules implementing section 252(d)(1) of the Communications Act – namely, TELRIC. The FCC states that the appropriate legal standard to determine the correct price of section 271 checklist items is found in sections 201 and 202. Nowhere, however, does the FCC state these two different legal standards may not result in the same rate-setting

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[17] *See Triennial Review Order*, para. 656.

[18] *See Triennial Review Order*, para. 659 (emphasis added).

methodology. In fact, the FCC itself has allowed the use of forward-looking economic costs to establish the rates for tariffed interstate telecommunications services regulated under sections 201 and 202 of the Communications Act – services which are <u>not</u> subject to the pricing standards in section 252(d)(1) of the Communications Act.[19]

Furthermore, nowhere does the FCC preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC* to establish the prices for access to section 271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order*, there are various methodologies for the determination of forward-looking, long-run incremental cost.[20] TELRIC describes only one variant, established by the FCC for setting UNE prices under section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles.[21] Thus, the FCC's *Triennial Review Order* does not preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with sections 201 and 202 of the Act.[22]

Moreover, the pricing standard under sections 201 and 202 of the Act should create minimal upset for the pricing already established by the Department for the HFPL. Specifically, the standards of sections 201 and 202 are that the prices for section 271

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[19] *See, e.g., Access Charge Reform,* CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 12984, para. 57 (2000).

[20] *See Local Competition Order,* FCC 96-325, at para. 631.

[21] *See Local Competition Order,* FCC 96-325, at paras. 683-685 (defining "three general approaches" to setting forward-looking costs).

[22] For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order,* FCC 96-325, at para. 684.

checklist items be just, reasonable and non-discriminatory. The principle of non-discriminatory pricing is exactly what has been applied in Massachusetts as the recurring rate for the HFPL is set at the same amount of loop cost allocated by Verizon to its own tariffed xDSL services, zero. Moreover, while these rates may be *consistent* with TELRIC, they are also consistent with the statutory requirement of non-discriminatory pricing.[23] Accordingly, the recurring rate of zero for unbundled access to the HFPL comports with the statutory pricing standard specified by the FCC for section 271 checklist items.

III. The Department's Independent State Law Authority to Unbundle the HFPL is Preserved by the Act and Has Not Been Preempted by the FCC.

This Department should also require Verizon to tariff unbundled access to line sharing pursuant to Massachusetts state law.

A. The Department Has Independent State Law Authority to Unbundle the HFPL.

This Department has independent authority under Massachusetts law to require Verizon to provide competitors with unbundled access to the HFPL. The FCC decision did not affect that authority. Under the Massachusetts General Laws, the Department has broad authority to investigate service offerings in the context of proposed tariffs.[24] The Department also has independent state law authority under its ability to hold public hearings upon notice of a proposed rate change.[25] In 1996, this Department made it clear that the Department had acted under state law in requiring Verizon to offer competitors

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[23] *See* 47 U.S.C. § 202(a) (forbidding "unjust or unreasonable discrimination" in "charges, practices…[or] facilities").

[24] MASS GEN. LAWS ANN. ch 159 §19.

[25] *Id*. at §20.

access to dark fiber as an unbundled network element before the FCC required dark fiber to be unbundled.[26] The Department determined that dark fiber was an essential part of Massachusetts local exchange service. This Department has been proceeding, and has the authority to continue to proceed, pursuant to state law.

Accordingly, this Department can, should, and indeed must order the unbundling of the HFPL under its own independent state law authority. Furthermore, this Department should require Verizon to tariff line sharing in accordance with its ruling to unbundle line sharing under state law.

B. The Department's Independent State Law Authority is Preserved by the Act.

It is likewise beyond dispute that the authority granted under its independent state law authority is not preempted by the federal Telecommunications Act. Section 252(e)(3) of the Act, entitled "Preservation of authority" explicitly states that:

> [N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.[27]

Likewise, Section 251(d)(3) of the Act, entitled "Preservation of State access regulations" states:

> In prescribing and enforcing regulations to implement the requirements of this section, the [Federal Communications] Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local

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[26] *Consolidated Arbitrations*, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3 (December 4, 1996) ("*Phase 3 Order*"). Under State action, the Department ordered dark fiber as an unbundled network element.

[27] 47 U.S.C. § 252(e)(3).

> exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[28]

Accordingly, the Act preserves Massachusetts's independent authority.

C. The Department's Independent State Law Authority Was Not Preempted by the FCC in its *Triennial Review Order*.

It is likewise beyond dispute that the authority granted under independent state law is not preempted by the FCC's *Triennial Review Order*. Nor could it be. While the FCC has the authority to interpret the Act, it does not have the authority to re-write it. Indeed, any deference previously accorded to the FCC's interpretation of the Act under the *Chevron* doctrine has long since been forfeited because the FCC's interpretation of the Act has been repeatedly reversed by the D.C. Circuit.[29] Thus, notwithstanding any statements in the *Triennial Review Order,* the Act defines this Department's authority, and, as set forth above, the Act does not evince any general Congressional intent to preempt state law unbundling orders. Rather, the Act expressly preserves such state law authority.

Should this Department place stock in the FCC's interpretation of the Act in its *Triennial Review Order*, it is worth noting that even the FCC recognized that the aforementioned provisions of the Act expressly indicate Congress' intent <u>not</u> to preempt state regulation, and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that

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[28] 47 U.S.C. § 251(d)(3).

[29] MCI v. AT&T, 512 U.S. 218,229 (1994) (holding that an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear).

> the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.[30]

The FCC further acknowledges in the *Triennial Review Order* that Congress expressly declined to preempt states in the field of telecommunications regulation:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.[31]

Accordingly, the FCC has explicitly acknowledged that this Department retains its independent unbundling authority.

1. The FCC Held that State Law Authority is Preserved Unless the Exercise of That Authority Would "Substantially Prevent Implementation" of Section 251.

In its *Triennial Review Order* the FCC claimed to identify a narrow set of circumstances under which federal law would act to preempt state laws unbundling orders:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime…
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> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.[32]

30 *See Triennial Review Order*, at ¶ 191.

31 *See Triennial Review Order*, at ¶ 192.

32 *See Triennial Review Order*, at ¶¶ 192, 194.

Based upon the Eight Circuit's *Iowa Utilities Board I* decision the FCC specifically recognized that state law unbundling orders that are inconsistent with the FCC's unbundling orders are not *ipso facto* preempted:

> That portion of the Eighth Circuit's opinion reinforces the language of [section 251(d)(3)], i.e., that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).[33]

In sum, the FCC's *Triennial Review Order* confirms that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules is ***insufficient*** to create such a conflict. Rather, the FCC recognized that the state laws would not be subject to preemption unless they "substantially prevent implementation" of section 251.

2. The FCC Did Not Conclude That Any Existing State Commission Orders Unbundling the HFPL or Hybrid Loops Would "Substantially Prevent Implementation" of the Act or the FCC's Rules.

In its *Triennial Review Order*, the FCC did not preempt ***any existing*** state law unbundling requirements, nor did it act to preclude the adoption of ***any future*** state law unbundling requirements. This is significant because several states, including California and Minnesota, have exercised their independent state law authority to unbundle the HFPL.[34] Likewise, several states, including Illinois, Wisconsin, Indiana, and Kansas,

[33] *See Triennial Review Order*, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

[34] **California:** CPUC Docket No. R.93-04-003/I.93-04-002; Open Access and Network Architecture Development, Permanent Line Sharing Phase, D. 03-01-077(Jan. 30, 2003); **Minnesota:** MPUC Docket No. P-999/CI-99-678; *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access* (Oct. 8, 1999).

have exercised their independent authority to unbundle hybrid loops.[35] The FCC declined to preempt any of these unbundling orders, stating only that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation."[36] Accordingly, the FCC specifically acknowledged that in many circumstances state law unbundling of the HFPL and hybrid loops would be consistent with the FCC's framework and would not frustrate its implementation.

Recognizing its ability to preempt state unbundling orders was limited (if existent at all), the FCC declined to issue a blanket determination that all state orders unbundling the HFPL or hybrid loops were preempted. Rather, the FCC invited parties to seek declaratory rulings from the FCC regarding whether individual state unbundling orders "substantially prevent implementation" of Section 251. Contrary to this standard, however, the FCC stated that it was "*unlikely*" that it would refrain from preempting a state law or Order that required the "unbundling of network elements for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis."[37] While the FCC's preemption analysis (or more accurately, its unsupported supposition) is flawed, it is important to note that even

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[35] **Illinois:** ICC Docket No. 00-0393; P*roposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service* (March 14, 2001); **Wisconsin:** WPSC Docket No. 6720-TI-161; Investigation into Ameritech Wisconsin's Unbundled Network Elements (March 22, 2002); **Indiana:** *IURC Cause Number 40611-S1, Phase II; In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rate's for Interconnection, Service, Unbundled Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes* (Feb. 17, 2001); **Kansas:** KCC Docket No. 01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003).

[36] *See Triennial Review Order*, ¶ 195.

[37] *See Triennial Review Order*, ¶ 195.

pursuant to this faulty analysis the FCC expressly refused to conclude that an order unbundling the HFPL or hybrid loops would be preempted as a matter of law, thereby signaling to state commissions that the HFPL could be unbundled under particular circumstances.

3. State Law Access Requirements Are Valid "As Long as the Regulations Do Not Interfere With the Ability of New Entrants to Obtain Services."

As discussed above, the FCC's *Triennial Review Order* allows this Department to proceed under state law. The proper analysis to determine whether state access laws impermissibly conflict with the federal regulatory regime is set forth in *Michigan Bell v. MCIMetro*, 323 F.3d 348 (6th Cir. 2003). In *Michigan Bell*, the Sixth Circuit Court of Appeals refused to preempt an Order of the Michigan Public Service Commission ("PSC") (allowing MCI to transmit resale orders by fax pursuant to its Michigan tariff) which SBC argued "conflicted" with MCI's tariff, and hence, the Act. Conducting its preemption analysis the Sixth Circuit first noted that the Michigan PSC's authority was expressly preserved by the Act:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. ***In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition***, stating that the Act does not prohibit state commission regulations 'if such regulations are not inconsistent with the provisions of [the FTA].'[38]

The Court then explained that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not

[38] *Michigan Bell*, 323 F3d at 358.

preempted.[39] The Court later reiterated that an Order of the Michigan Commission would be affirmed provided that it "does not frustrate the purposes of the Act."[40] An order requiring unbundled access to line sharing under Massachusetts law would not prevent a carrier from taking advantage of the network opening provisions of the Act, nor would such unbundling frustrate the purposes of the Act. The Court unequivocally stated:

> The Commission can enforce state law regulations, ***even where those regulations differ from the terms of the Act*** or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.[41]

Accordingly, contrary to the FCC's statement that it is "unlikely" that state laws requiring unbundling would escape preemption, it is clear that this Department had, and continues to have the authority to implement state law and require access to line sharing under Massachusetts law because such orders would not interfere with the ability of new entrants to obtain services.

4. Contrary to its "Unlikely" Prediction, the FCC Acknowledges Unbundling Will Be Required Under Certain Circumstances.

Although the FCC stated that it was "unlikely" to refrain from preempting a state law requiring unbundling, the *Triennial Review Order* broadly identifies the circumstances that would lead the FCC to decline to preempt a state commission order unbundling a network element that the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between

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39 *Id*. at 359.

40 *Id*. at 361.

41 *Id*.

geographic regions."[42] Indeed, according to the FCC, such a granular "approach is required under *USTA*."[43] Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of section 251.

D. The Department Has the Authority to Require Verizon to Provide Access to the HFPL Consistent with Federal Law Based Upon Massachusetts-Specific Facts.

While the FCC's *Triennial Review Order* found that competitors are not impaired on a national basis without access to the HFPL, the FCC also made clear that state-specific facts could warrant a different unbundling requirement in a particular state. Such state-specific circumstances warrant the unbundling of the HFPL in Massachusetts. That is, the facts relied upon by the FCC in reaching a national finding of non-impairment without access to the HFPL do not exist in Massachusetts. Because of these Massachusetts-specific circumstances, an obligation imposed by Massachusetts law to unbundle access to the HFPL would not substantially prevent implementation of section 251, and the FCC's federal unbundling regime. Accordingly, the FCC would be unlikely to preempt such a finding.

The primary and deciding factor relied upon by the FCC to make a national finding of non-impairment with respect to the HFPL is the supposed ability of competitors to obtain revenues from all of the services the loop is capable of offering, including voice and data bundles using line splitting. In the state of Massachusetts,

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42 *See Triennial Review Order*, ¶196.

43 *See Triennial Review Order*, para. 196 (citing *USTA*, 290 F.3d at 427).

however, Verizon has not made line splitting operationally available in the same manner as its own retail voice and data bundles. Indeed, there are significant financial and operational obstacles to CLEC's providing line splitting in Massachusetts. For example, there are customer impacting limitations on timing of line splitting orders; there are discriminatory versioning policies for submission of line splitting orders; Verizon recently unilaterally and arbitrarily determined that it would refuse to act on a change request to implement line splitting migrations – even though every requesting CLEC gave this change request a rating of 5 (reflecting the highest level of importance); and Verizon continues to refuse to provision line splitting with resold voice service. Because of the operational and cost disadvantages competitive data providers continue to face in providing line split voice and data bundles in Massachusetts, competitors face severe competitive disadvantages in obtaining "all potential revenues derived from using the full functionality of the loop."[44] Accordingly, the assumption underlying the FCC's conclusion that competitors are not impaired without access to the HFPL does not comport with the facts as they exist in Massachusetts. In the end, it is consumers that pay the price by losing their opportunity to choose their data provider.

Thus, in Massachusetts, the requisite state-specific circumstances exist for Massachusetts to unbundle access to the HFPL under its independent state law authority, without substantially preventing the implementation of section 251 of the federal Communications Act.

[44] *See Triennial Review Order*, ¶ 258.

IV. Conclusion

Covad respectfully submits that it has demonstrated that Verizon's October 2 Tariff Filing is unlawful and should be suspended and investigated. The Department should reject or suspend and investigate the limitations and requirements proposed in Tariff 17. This Department should also require Verizon to tariff unbundled access to line sharing under Section 271 of the Act and as a UNE under Massachusetts state law.

Respectfully Submitted:

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